No. 90-1464

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

DOUG ROY, JR., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. THE SUPREME COURT'S TEACHINGS 2

II. THE CASES CONFLICT ON THE RIGHTS AND LIMITS OF THE TRIAL AND APPELLATE COURTS IN RULING ON AND REVIEWING NEW TRIAL MOTIONS 3

A. The Conflict On The Power Of Trial Courts To Order New Trials 3

B. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176 (9th Cir. 1989), cert. denied, 110 S. Ct. 868 (1990) 6

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 2, 10

Berkovich v. Hicks, 922 F.2d 1018 (2d Cir. 1991) 6

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) 6

Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974) 4

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 2

Consumers' Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093 (3d Cir. 1986) 3

Eyre v. McDonough Power Equip., Inc., 755 F.2d 416 (5th Cir. 1985) 6

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 2

Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411 (8th Cir. 1985) 3

Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987) 6

McGee v. South Pemiscot School District, 712 F.2d 339 (8th Cir. 1983) 3

McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637 (D.C. Cir. 1988) 4

Narcisse v. Illinois Central Gulf Railroad Co., 620 F.2d 544 (5th Cir. 1980) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127 (2d Cir. 1986) 6

Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247 (10th Cir. 1988) 6

Payton v. Abbott Labs, 780 F.2d 147 (1st Cir. 1985) 3

Phoenix v. Com/Systems, Inc., 706 F.2d 1033 (9th Cir. 1983) 6

Portage II v. Bryant Petroleum Corp. 899 F.2d 1514 (6th Cir. 1990) 4

Portman v. American Home Prods. Corp., 201 F.2d 847 (2d Cir. 1953) 5

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1978) 3

Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) 4

Roy v. Volkswagen Aktiengesellschaft, 600 F. Supp. 653 (C.D. Cal. 1985) 8, 9

Roy v. Volkswagen of America, 896 F.2d 1174 (9th Cir. 1990) 7

United States v. Johnson, 327 U.S. 106 (1946) 2

STATUTES AND CODES

Federal Rule of Civil Procedure 59 ..... 1, 2, 3

MISCELLANEOUS

11 C. Wright & A. Miller, Federal Practice and Procedure, § 2806, p. 42 7

6A J. Moore, Moore's Federal Practice §59.15[3] at 59-309-10 2

INTRODUCTION

The Roys say "there is no conflict among the circuits," and urge that Volkswagen's petition be denied. Respondents' Brief in Opposition ("Opp."), p. 21. But the Roys avoid the issues. They blur the distinction between the duties and roles of trial and appellate courts, and so obscure the very issue before the court – whether the traditional roles and duties should be, in effect, reversed, as they have been in this case and in some other circuits. The Roys do not come to grips with the cases that present the conflict squarely, and indeed, ignore their own argument to the Ninth Circuit, which recognized the conflict and urged the Ninth Circuit to apply the more restrictive revisionist standard.

The conflict is real, and affects every case tried in the federal courts. As Professor Arthur Miller, representing *amicus curiae* the Product Liability Advisory Counsel, puts it, "the lower federal courts are in complete disagreement over what inherently should be a uniform federal standard under Rule 59." Brief of Amicus Curiae in Support of Petitioners, p. 11.[1] This Court never has addressed the standards for trial and appellate court review of new trial motions under Federal Rule of Civil Procedure 59. It should do so now. It should confirm that while trial courts have discretion, appellate courts cannot arrogate that discretion to themselves and, in effect, act like trial courts, particularly where the trial court found a "serious miscarriage of justice."

ARGUMENT

The Roys say the trial and appellate courts' roles are "inseparably linked," Opp. p. 12 n.6, and then do not discuss the differences between them. That obscures the very problem at issue – what the appropriate standard of

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[1] Ironically, the Roys say Professor Miller agrees with them. Opp., pp. 12, 14, 18, 21.

review is, and the revisionist courts' failure to adhere to it, and to the traditional and proper allocation of functions between trial and appellate courts, based on what each is best situated to decide. That is the problem. The Roys do not address it.

I. THE SUPREME COURT'S TEACHINGS.

The Roys dismiss as "dicta" and "outmoded" this Court's advice on the proper roles of appellate and trial courts in deciding new trial issues based on the weight of evidence and prejudice. Opp., pp. 13 n.8, 14. According to the Roys, the Court's decisions predate the 1933 advent of the practice of including new trial orders in the record, and a 1948 change in the Judiciary Code. Opp., pp. 12-13 n.8. Accordingly, the Roys argue, the Court's teachings in *Fairmount Glass, Cone,* and *Johnson* should be disregarded entirely. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947); *United States v. Johnson*, 327 U.S. 106, 111-12 (1946). But the Court observed as recently as 1980 that an appellate court's review, if any, is very limited: "the authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, the principles underlying the Court's earlier decisions (principles the Roys ignore) still hold true today: Trial courts, which have a "feel of the case that no appellate printed transcript can impart," are far better equipped than appellate courts to assess the evidence. *Cone*, 330 U.S. at 216. Accordingly, the commentators believe the cases based on those principles should apply to appellate review of new trial orders under Rule 59. *See, e.g.*, 6A J. Moore, *Moore's Federal Practice* §59.15[3] at 59-309-10 ("The rule of [*Johnson*] seems applicable to motions for new trials in civil actions.").

All this is, ultimately, beside the point. The Court, not the Roys, should decide whether the time-tested principles it has endorsed for the roles of trial and appellate courts apply to new trial motions under Rule 59, or have been abandoned. If anything, the Roys' argument that the Court has said nothing relevant on the issue underscores the need for a definitive ruling from the Court.

II. THE CASES CONFLICT ON THE RIGHTS AND LIMITS OF THE TRIAL AND APPELLATE COURTS IN RULING ON AND REVIEWING NEW TRIAL MOTIONS.

A. The Conflict On The Power Of Trial Courts To Order New Trials.

Traditional cases hold that trial courts may weigh evidence and assess credibility in ruling on new trial motions. The Roys agree that this should be the rule everywhere, and say that it is. Opp., 14-15.[2]

But some revisionist courts of appeals have held that trial courts deciding new trial motions may not weigh credibility. For example, the Third Circuit recently held: "A dispute over credibility will not justify a new trial." *Consumers' Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986) (*citing Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978)). *See also Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980); *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir. 1983); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985). *See* Petition, pp. 17-18.

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[2] The Roys point out that the trial court should not grant a new trial simply because the judge "would have reached a different result had he been the trier of fact." Opp., p. 17 (*quoting Payton v. Abbott Labs*, 780 F.2d 147, 153 (1st Cir. 1985)); *see also* Opp., pp. 16, 19. We agree; that does not change the rule that the trial court may grant a new trial upon finding the verdict contrary to the great weight of the evidence.

The Roys do not address these cases, or the conflicting rule they announce. That is odd, particularly since the Roys themselves cited these very cases to the Ninth Circuit in opposing rehearing, and argued that "some courts have suggested that trial courts should not issue a new trial order based merely on credibility grounds." Response to Petition for Rehearing With Suggestion for Rehearing En Banc, p. 10 n.6.

Traditional cases hold that a trial court may order a new trial even where "substantial evidence" supports the jury's verdict. Petition, pp. 16-17. Again, the Roys agree that this should be the rule everywhere, and say that it is. Opp., p. 16.

But some revisionist courts deny the right to grant a new trial "as long as there is *some support* for the jury's decision." *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987) (emphasis added). *See also Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (conditional new trial order reversed where there was "significant evidentiary basis for the jury's verdict"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 647 (D.C. Cir. 1988) (reversing new trial order where "there was substantial evidence" supporting jury verdict); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) (new trial order reversed where jury's first verdict *"clearly within* the universe of possible awards which are supported by the evidence") (*quoting Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (emphasis in original)).

Again, the Roys do not address the cases that create the conflict.

Instead, the Roys cite revisionist cases that, they say, "agree" with the traditional cases on the trial courts' right to weigh evidence and credibility, and reject verdicts supported by "substantial evidence." Opp., pp. 15, 16. But even if true, those cases do not overrule or change the

revisionist cases that hold the opposite.[3] The confusion in the case law is real, and calls out for resolution by this Court.

B. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders.

The Roys collapse trial and appellate court standards, and so dodge entirely the disparate approaches the courts of appeals take to the scope of their review of new trial orders. Opp., p. 12 n.6. The Roys announce that there is no conflict, but do not say what the supposedly uniform test is, much less come to grips with the case law that proves there is none. In fact, the standards range from "no review" in the Second Circuit to "strict scrutiny" in others, and everything in between.

The Roys discount the Second Circuit's "no review" rule, saying the Second Circuit bases its rule on "cases from the era when appellate court review was precluded by practical and statutory limitations." Opp., p. 13 n.8. But that is wrong; the seminal Second Circuit case, *Portman*, was decided after the 1933 and 1948 events that the Roys say are pivotal. *Portman v. American Home Prods. Corp.*, 201 F.2d 847 (2d Cir. 1953). Moreover, whatever the source or wisdom of the Second Circuit rule, it is the law there, and squarely conflicts with the rule applied in this case and elsewhere. As recently as January of this year, the Second Circuit reaffirmed its "no review" stance in weight-of-evidence cases:

> On appeal, however, when a new trial is sought on the ground that the jury verdict was against the weight of the evidence, "we have disclaimed the authority to review a ruling on such a motion."

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[3] Moreover, even if revisionist courts always agreed with traditional courts on the rights of trial courts, they disagree on the scope of appellate court review. Petition, pp. 19-24. The Roys do not address that. Pp. 5-9, below.

Berkovich v. Hicks, 922 F.2d 1018, 1026 (2d Cir. 1991) (*quoting Newmont Mines, Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 133 (2d Cir. 1986).[4] The conflict could not be clearer.

There also is conflict among circuits that do review new trial orders based on weight of the evidence. The courts generally agree that a trial judge's view that a verdict is against the great weight of the evidence should be reversed only upon a showing of "abuse of discretion." But those are just words, and whether the standard the words allude to is consistent or not turns on whether the words mean the same thing in the circuits that recite them. Here, the words have very different meanings, depending on which court you are in.

In traditional courts, review for "abuse of discretion" does not include reweighing of evidence and credibility. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987); *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985); *Phoenix v. Com/Systems, Inc.*, 706 F.2d, 1033, 1036 (9th Cir. 1983). Petition, pp. 20-21. In contrast, in revisionist courts, review for abuse of discretion means "stringent," "strict," "rigorous" – in substance, *de novo* – review of the weight and credibility of the evidence and witnesses. *See* Petition, pp. 3-24. In fact, as a matter of logic a court cannot "strictly" review a determination that a verdict is contrary to the great weight of the evidence

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[4] The Roys dig up an aberrant 1965 Second Circuit case that reviews a new trial order that was decided, among other grounds, on the weight of the evidence. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965). Opp., pp. 13, 20. But the Second Circuit has never cited *Berner* since for the proposition that new trial orders on weight-of-evidence grounds are reviewable in that Court, and cases decided since, including *Berkovich* decided just three months ago, confirm that *Berner* is not the law in the Second Circuit. *See* Petition, p. 21.

without reweighing the evidence itself. That is exactly what appellate courts traditionally are not supposed to do, and it is exactly what the Ninth Circuit did here; it saw its task as assessing whether the trial court was right that the jury verdict was clearly against the weight of the evidence, and so reweighed the evidence and credibility of witnesses for itself. The court concluded that the Roys' evidence was "persuasive," that the evidence was "substantially balanced," and that Volkswagen's evidence did not "preponderate." *Roy v. Volkswagen of America*, 896 F.2d 1174, 1177, 1179 (9th Cir. 1990) (App. 15B, 19B). *See* Petition, pp. 7-9.[5]

The Roys advise that the courts' common use of the words "abuse of discretion" cures the conflict. But even the Roys concede that the meaning of "abuse of discretion" is not "totally uniform." Opp., p. 21.[6] However, they propose, non-uniformity is no problem because trial courts will never know what they can do under an abuse of discretion standard anyway. *Id.* That is wrong.

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[5] The Roys state that an appeal of the first trial now is pending and append Volkswagen's Notice of Appeal to their brief. Opp., p. 11 & App. 1a-2a. The Roys do not mention, however, that they have urged the Ninth Circuit that Volkswagen has no right to appeal, and that the appeal should be dismissed.

[6] The Roys also concede that the courts of appeal use "loose language" when drawing from JNOV cases. Opp., p. 20. The courts use more than loose language; some use the wrong standard, just as the Ninth Circuit initially did here. *Roy II*, 896 F.2d at 1179 (App. 18B-19B). *See* 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2806, p. 42 ("The matter is complicated because of the recurrent tendency on the part of courts to confuse the standard for a new trial with that for a directed verdict or a judgment notwithstanding the verdict"). Again, the Roys point to opinions that do not confuse the standards (Opp., pp. 19-20), but those cases do not change the many cases that do confuse the standards.

Although "variations are inherent in the indefinable notion of 'discretion'," Opp., p. 21, "variations" have no place in the definition of the outer limits of discretion. Discretion has limits; "abuse" of discretion means the limits have been exceeded; the question is what the limits are. Indeed, the observation that appellate courts' rulings are not uniform because variations are "inherent" in "discretion" discloses the Roys', and the Ninth Circuit's, fundamental error; trial courts have discretion, but appellate courts do not. The task of the appellate court is to measure the trial court's exercise of discretion against a rule of law defining the discretion's limits. Where the Roys themselves concede that the cases define no clear limits, the Roys make a compelling case for review.

As to prejudice, even the revisionist courts do not go as far as the Ninth Circuit did here. The Roys cite no case that has reversed a trial court's judgment that the trial was "pervaded" by "emotion," that the jury was "overwhelmed" and "obviously swayed" by sympathy, and that it rendered a verdict that was a "serious miscarriage of justice." *Roy v. Volkswagen Aktiengesellschaft*, 600 F. Supp. 653, 655 (C.D. Cal. 1985) (App. 6A, 7A). And they cite no case that called – as the court did here – for record "evidence" of prejudice.[7] Nor is such evidence called for.

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[7] The Roys quibble that the trial court found no "prejudice," only "sympathy." Opp., p. 18 n.11. But "sympathy" that "overwhelms" and "obviously sways" a jury, and leads it to a "serious miscarriage of justice," is prejudicial. *Roy I*, 600 F. Supp. at 655 (App. 6A-7A). The Roys also say "evidence" was necessary because the court's assessment of jury sympathy was a "conclusory statement." Of course the trial court "concluded" that the jury was overwhelmed by sympathy; "for these reasons" it ordered a new trial. *Roy I*, 600 F. Supp. at 655 (App. 6A-7A). That decision was based on first-hand observation, which a cold record cannot provide. Moreover, the second jury's verdict is powerful "evidence" that sympathy, not the facts on defect and causation, drove the first verdict. The Roys say nothing about that.

A trial court's finding of jury prejudice comes from its first-hand observation of juror reactions – averted eyes, tears, wide-eyed stares, disinterest in important evidence – that do not appear on the printed record. Courts of appeals necessarily cannot – and so should not – second-guess such a finding.[8] Surely it would be counterproductive to have trial courts interrogate jurors as to their decision-making process, in order to develop record evidence of what prejudiced and swayed them.

In sum, the split between the traditional and revisionist approaches is real, and leads to disparate results in like cases. Trial courts have no guidance, and parties increasingly are litigating second trials, only to have them mooted by overzealous courts of appeal bent on *de novo* review of facts. For example, of the cases the parties here cited from the 1980s, more new trial grants were reversed than affirmed. That is not "authority confided *almost entirely* to the exercise of discretion on the part of the trial

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[8] The Roys suggest that the jury prejudice was Volkswagen's fault. But the Ninth Circuit did not say that (although urged to by the Roys), and for good reason. Volkswagen objected to all evidence of injuries when it moved to bifurcate; when the motion was denied, it became clear that the "horrible" evidence would come in. Volkswagen showed the child's burns to the jury in voir dire to try to defuse in some way the powerful effect plaintiffs' burn evidence inevitably would have; but obviously Volkswagen was unsuccessful. At trial, the plaintiffs' doctor undressed the child before the jury. And Judge Curtis, who did not participate in voir dire, based his assessment of prejudice solely on what he saw at trial: The jurors' reactions at trial to the "many graphic and explicit photographs" of the child's "horrible" burns, and the "many operations" he had and would need in the future. *Roy I*, 600 F. Supp. at 655 (App. 6A). Furthermore, it was the jury's extreme reaction to the evidence that was critical.

court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

The Roys accuse Volkswagen of "result-oriented analysis." Opp., p. 15 n.10. To be sure, the disparate rules do compel different results on the same facts. This case is a good example; under the "no review" rule of the Second Circuit, and under the traditional rule that forbids appellate court reweighing of evidence, the result here could not happen. If it is "result-oriented" to request a uniform rule leading to uniform results on the limits of discretion, Volkswagen is guilty as charged.

The Court's attention to the problem is badly needed.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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